IN THE HIGH COURT OF BOMBAY AT GOA

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WRIT PETITIONS NO. 119 OF 2004 & 120 OF 2004

WRIT PETITION NO. 119 OF 2004

1. Mr. Rosario Fernandes,
   s/o late Antonio
   Fernandes, aged 54 years,
   businessman,

2. Mrs. Maria Conceicao
   Fernandes, d/o Domingos
   Fernandes, aged 49 years,
   housewife, both r/o
   House No.1611(A), Vasvaddo,
   Benaulim, Salcete, Goa. ... Petitioners.

Versus

Mr. Menino Fernandes, s/o
late Roque Fernandes, aged
57 years, fisherm,an, r/o
house no.1588(1),Vasvaddo,
Benaulim, Salcete, Goa,
(expired, through legal heirs):

a) Mrs. Piedade Fernandes,
   widow of Menino Fernandes,
   major of age, r/o House
   No.1588(1) Vasvaddo,
   Benaulim, Salcete, Goa,

b) Mrs. Sabina Rodrigues,
   aged 31 years,
   and her husband,

c) Mr. Pedrinho Rodrigues,
   aged 33 years,

   Both of them r/o 3rd
   Ward, Tapem, Colva,
   Salcete,

d) Mrs. Escolastica Fernandes,
   aged 27 years and her
   husband,

e) Mr. Domingos Santano
   Fernandes, aged 29 years,

   Both r/o H.No.1610-A,

Vasvaddo, Benaulim,
Salcete,

f) Mr. Mario Fernandes,
aged 29 years,

g) Mr. Anthony Fernandes,
aged 24 years,

h) Mr. Eddie Fernandes,
aged 21 years,

All of them r/o H.No.
1588(1), Vasvaddo,
Benaulim, Salcete. ... Respondents.

Shri A. F. Diniz, advocate for the petitioners.

Shri C. Vas, advocate for the respondent nos.1(a), (f), (g) and (h).

WRIT PETITION NO.120 OF 2004

1. Mr. Rosario Fernandes,
s/o late Antonio
Fernandes, aged 54 years,
businessman,

2. Mrs.Maria Conceicao
Fernandes, d/o Domingos
Fernandes, aged 49 years,
housewife
Both r/o House No.1611(A)
Vasvaddo, Benaulim,
Salcete, Goa. ... Petitioners.

Versus

Mr. Sebastiao Fernandes,
s/o late Roque Fernandes,
aged 65 years, fisherman,
r/o House No.1588(1),
Vasvaddo, Benaulim,
Salcete, Goa. ... Respondent.

Shri A. F. Diniz, advocate for the petitioners.

Shri C. Vas, advocate for respondents no.1(a), (f), (g) and (h).

CORAM : S. A. BOBDE, J.

DATE : 15th July, 2004.

ORAL JUDGMENT

Rule returnable forthwith. Heard by consent. This common order will dispose of both the Writ Petitions.

2. By this petition the petitioners/defendants challenge the impugned Order by which the learned trial Court has refused to try the issue of limitation as a preliminary issue, since it involves a mixed question of fact and law and has refused to recast the issue. Having heard the parties and having perused the plaint, I am of the view that the order of the trial Court as regards trial of the issue of limitation as preliminary issue, is correct and does not call for any interference. Though the respondent/plaintiff has pleaded that he received a notice dated 22nd March, 1999 (in Writ Petition No. 119/2004) and 24th March, 1999 (in Writ Petition No. 120/2004) by which the defendants terminated the agreement dated 8th November, 1994(in Writ Petition No. 119/2004) and 11th December, 1995 (in Writ Petition No. 120/2004), in paragraph 27 of the plaint in Writ Petition No.119/2004 and paragraph 20 of the plaint in Writ Petition No. 120/2004, they have pleaded that the cause of action arose on 17th April, 2004. It is thus not a pure question of law as argued by the learned counsel for the petitioner.

3. As regards the recasting of the issue, the learned counsel for the respondent/plaintiff agrees that the issue be recast as desired by the petitioners in the following

terms.

Thus, issue no. 4 shall be deleted and recast as follows:-

"Whether the plaintiff has been and is ready and willing to perform his part of the Agreement.?"

4. The Writ Petitions are partly allowed in the aforesaid terms.

S.A. BOBDE, J.

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